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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF (NC)

**CISCO'S TRIAL BRIEF RE:
COPYRIGHTED WORK**

REDACTED VERSION

Date: November 21, 2016
Time: TBD
Dept: Courtroom 3 - 5th Floor
Judge: Hon. Beth Labson Freeman

Pursuant to the Court’s direction at the pretrial conference, plaintiff Cisco Systems, Inc. respectfully submits this Trial Brief identifying and further defining the copyrighted works at issue. Specifically, the copyrighted works in this case are: (1) the user interfaces of each of Cisco’s four registered operating systems; and (2) the technical documentation of each such system.

A. Cisco Has Consistently Identified Its User Interfaces And Technical Documentation As The Infringed Works

Cisco’s longstanding position has been that Arista infringes both the *user interfaces* found in four Cisco operating systems (sometimes referred to as Cisco’s “CLI”) and associated technical documentation. *See* ECF 64 ¶ 40 (“Arista Blatantly And Extensively Copied Cisco’s CLI”); *id.* ¶ 6 (“Arista also flagrantly copied Cisco’s operating system documentation into Arista’s documentation.”); Cisco’s Response to Interrogatory No. 1 (Jenkins Dec. Ex. 2) at 6 (“Arista specifically emphasizes the similarity between its infringing CLI and Cisco’s patented and copyrighted CLI to promote sales of its infringing products.”); Almeroth Rpt. (ECF 616-4) ¶¶ 48-52 (introducing and explaining Cisco’s CLI). This has been Cisco’s position since its initial complaint:

[A] key component of Cisco IOS is the “Command-Line Interface” or CLI. *The CLI is the user interface by which users of Cisco products communicate with the product in order to configure and manage the product.* Cisco’s CLI includes an elaborate taxonomy of unique textual command expressions, authored by Cisco’s employees, which a user learns in order to “talk” to the product. ... Cisco’s CLI also includes an original structure and hierarchy (and naming convention) of command modes and associated prompts (ECF 1 ¶ 27 (emphasis added)).

Arista and its experts understand what Cisco alleges was copied. *See* Arista 30(b)(6) Dep. Notice (Jenkins Dec. Ex. 1) ¶¶ 19-21 (“‘Cisco IOS’ means any Cisco operating system ... ‘Cisco CLI’ means the command-line interface used with and supported by any version of Cisco IOS”); Black Rpt. (ECF 381-1) ¶ 8 (referring to “the aspects of the Cisco CLI over which Cisco asserts copyright protection”); Elsten Rpt. (ECF 382-1) at 13 (“I further understand that Cisco is not alleging that Arista has copied the totality of Cisco’s IOS or NX-OS operating systems, or anything close to it.”). Arista’s efforts to define the works as “computer programs” (ECF 585 at 1) are at odds with this case’s history.

B. Cisco Implements Its User Interfaces In Its Four Operating System Programs

As Arista’s expert explains, [REDACTED]

[REDACTED]

1 [REDACTED]; accord ECF 64 ¶ 6.

2 These four programs provide, among other things, gigabit Ethernet switch functionality, and each is
 3 tailored to different product and customer needs. Almeroth Rpt. ¶¶ 66-68 (explaining respective uses).
 4 They also generate user interfaces suited to each Cisco networking product's capacity and purpose.
 5 The user interfaces include the five building blocks Cisco asserts: multiword command expressions,
 6 multiword command hierarchies, modes and prompts, command responses (or "screen outputs"), and
 7 help descriptions. Arista formed its EOS user interface [REDACTED]

8 [REDACTED]
 9 [REDACTED] Accordingly, Arista's user interface
 10 infringes each of the user interfaces which implement Cisco CLI in the four operating systems.

11 The Court should treat a user interface generated by multiple updated versions of a particular
 12 operating system as one unified work. Almeroth Rpt. ¶ 97. See *Castle Rock Entm't, Inc. v. Carol*
 13 *Pub. Grp., Inc.*, 150 F.3d 132, 138 (2d Cir. 1998) (84 episodes of *Seinfeld* considered in aggregate);
 14 *Eng'g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1339 (5th Cir. 1994) (similar as to
 15 user interface); *Sid & Marty Krofft Tele. Prods. v. McDonald's Corp.*, 1983 WL 1142, at *5 (C.D.
 16 Cal. Jan. 12, 1983). The same applies to Cisco's documentation. *Warner Bros. Entm't, Inc. v. RDR*
 17 *Books*, 575 F. Supp. 2d 513, 535 n.14 (S.D.N.Y. 2008) (related books treated as one work).

18 C. Cisco's User Interfaces And Technical Documentation Are Registered

19 Contrary to Arista's suggestion (ECF 585 at 2), Cisco did not need to register its user interfaces
 20 separately to assert that Arista infringes them. Copyright protection in a computer program includes
 21 the protectable elements of "the program's sequence, structure, and organization, as well as the
 22 program's user interface." *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1355-56 (Fed. Cir. 2014).
 23 The Copyright Office advises that "[a] single registration may be made for a computer program and its
 24 screen displays" which "will extend to any copyrightable screens generated by the program."
 25 *Copyright Registration for Computer Programs*, U.S. Copyright Office Circular 61 (Dec. 2012).

26 Here, *every* protectable element Cisco has asserted (ECF 552-1) can be found in the registered
 27 operating systems' user interfaces. See Almeroth Rpt. Exs. 2-6 (detailing where each element can be
 28 found in each operating system); Cisco's Response to Interrogatory Nos. 24 & 25 (ECF 345-2)

(similar); Ex. F. to Cisco's Response to Interrogatory Nos. 16 & 19 (ECF 616-15) (listing first appearance of each asserted command); *id.* No. 31, Ex. I (ECF 616-17) (help descriptions). Thus, the 26 registrations properly include Cisco's asserted protectable elements in its user interfaces.

D. Cisco's User Interfaces May Be Asserted Separately From Its Operating Systems

Each of Cisco's copyright registrations for its operating systems necessarily includes an independent registration for the associated user interface. Arista distorts Copyright Office policy by arguing that Cisco "cannot assert its user interfaces as separate works distinct from the computer programs of which they are a part." ECF 585 at 3 (citing 53 Fed. Reg. 21817 (1988 Copyright Office Reg. Decision)). In fact, the cited statement confirms that, "in the interest of a clear, consistent public record" and to "discourage piecemeal registration," a computer program registration "covers any copyrightable authorship in the screen displays, without any need for a separate registration." 53 Fed. Reg. at 21818. Courts agree that the proper approach is to treat "the single registration of the computer program as accomplishing *two interrelated yet distinct registrations*; one of the program itself and one of the screen displays or user interface of that program, to the extent that each contains copyrightable subject matter." *Mfrs. Techs., Inc. v. Cams, Inc.*, 706 F. Supp. 984, 993 (D. Conn. 1989) (emphasis added); *see also, e.g., Clarity Software, LLC v. Allianz Life Ins. Co. of N. Am.*, 2006 WL 2346292, at *7 (W.D. Pa. Aug. 11, 2006); *Jamison Bus. Sys., Inc. v. Unique Software Support Corp.*, 2005 WL 1262095, at *11 (E.D.N.Y. May 26, 2005); *Napoli v. Sears, Roebuck & Co.*, 874 F. Supp. 206, 211 (N.D. Ill. 1995). Thus, courts assessing user interface infringement claims regularly treat user interfaces as the relevant works.¹ This approach recognizes that user interfaces are protectable regardless of whether the underlying source code is copied. *Napoli*, 874 F. Supp. at 211 ("[T]he reason copyright coverage extends to non-literal elements is that the same non-literal element (i.e., the screen display) can be produced by different source codes.").

¹ *See, e.g., Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1026-41 (N.D. Cal. 1992), *aff'd*, 35 F.3d 1335, 1345 (9th Cir. 1994); *Computer Access Tech. Corp. v. Catalyst Enters., Inc.*, 2001 WL 34118030, at *15-17 (N.D. Cal. June 13, 2001); *Softel, Inc. v. Dragon Medical & Sci. Commc'ns*, 118 F.3d 955, 966 (2d Cir. 1997); *Eng'g Dynamics*, 26 F.3d at 1344; *Real View, LLC v. 20-20 Techs., Inc.*, 683 F. Supp. 2d 147, 154-58 (D. Mass. 2010); *Clarity Software*, 2006 WL 2346292, at *6-9. Arista, in contrast, relies on cases not addressing protectability, but rather the third fair-use factor, none of which address the particular circumstances of a user interface. *See* ECF 585 at 3.

1 Dated: November 10, 2016

Respectfully submitted,

2 /s/ John M. Neukom

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